STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No. 119889

vs.

DONNA ALICE YOST,

Defendant-Appellee.

Court of Appeals No. 2234056
Circuit Court No. 001304-AR

AMICUS CURIAE DENNIS RICHARDSON'S RESPONSE TO SUPPLEMENTAL CLARIFYING BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

Submitted by:

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ARGUMENT

THE POSITION OF THE *AMICUS* PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN THAT THE DECISION OF A MAGISTRATE AT A PRELIMINARY EXAMINATION ON THE QUANTUM OF EVIDENCE NECESSARY FOR BIND OVER SHOULD BE REVIEWED FOR ABUSE OF DISCRETION, WHEREAS REVIEW ON THE QUALITY OF EVIDENCE SHOULD BE REVIEWED *DE NOVO* IS, AT BEST, ILL-ADVISED.

I. The People's *Amicus* Has Come Full-Circle In It's Position Before This Court

The Prosecuting Attorneys Association of Michigan ("PAMM") petitioned this Court for and received the right to file an *amicus* brief in this case in support of the People of the State of Michigan. Dennis Richardson, whose petition for leave to appeal is pending before this Court, also asked for and received the right to file an *amicus* brief supporting defendant-appellant Donna Yost. Now PAAM has taken the unusual step of filing a "Supplemental Clarifying Brief" after full briefing and after oral arguments. Dennis Richardson asks to be heard in response.

PAAM's initial *amicus* brief advocated curtailing the magistrates' right to make credibility determinations should be curtailed and that review of magistrates' decisions on bind-overs should be subject to a *de novo* standard in all cases.

The PAAM *amicus* brief clearly advocated that "[r]eview of the magistrate's determination should be *de novo* and without any deference to the magistrate

because, like the motion for directed verdict, it is a question of law." (PAAM, *Amicus* Brief, p 25. Emphasis added).

After the fact, PAAM wants to abandon this position and substitute for it a novel standard that would bifurcate appellate consideration into an abuse of discretion standard for the "quantum" of evidence and a *de novo* review for the "quality" of evidence. (PAAM Clarifying Brief, pp 1-6).

II. THE PROSECUTION IN *YOST* HAS NOT ADOPTED PAAM'S NEW POSITION.

The People of the State of Michigan, as represented by the Bay County Prosecutor's Office, did not address the issue of standard of review in their Brief. However, any question of doubt on that standard was dispelled at the oral argument, where the prosecutor appealed for *de novo* review in all cases.

The Bay County Prosecutor, himself, argued this case. Several justices asked Mr. Sheeran what the standard of review should be if this Court curtailed the magistrates' right and duty to weigh credibility. He consistently responded that all review would be *de novo,* even if it meant increasing, dramatically, the number of motions to quash (by defendants) or to reinstate charges (by the People).

Therefore, PAAM's position lacks even the support of the party for whom PAAM appears as *amicus.*

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III. THE POSITIONS OF EITHER THE PEOPLE OF THE STATE OF MICHIGAN OR PAAM, OR BOTH, WOULD AMOUNT TO UNDESIRABLE JUDICIAL ACTIVISM.

The Michigan legislature has, in fact, given district court judges the duty to judge credibility by allowing the right to cross-examination at the preliminary exam.

The statute which created the right to a preliminary examination, MCL 766.12, specifically states that "[a]fter the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he has any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution." (Emphasis added).

Almost seventy years ago, this Court discussed, in the preliminary examination context, the fact that cross-examination necessarily concerns credibility. In *People v Dellabonda,* 256 Mich 486, 499-500 (1933), the Court wrote that:

> One of the elementary principles of cross-examination is that the party having the right to cross-examine has a right to draw out from a witness and lay out before the jury anything tending or which may tend to contradict, weaken, modify or explain the testimony of the witness on direct examination or which tends to elucidate the testimony *or affect the credibility of witnesses.* (Emphasis added).

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Dellabonda, supra, was not an isolated decision by this Court. It has been reaffirmed continuously. See, *e.g., Malicke v Milan,* 320 Mich 65, 70-71 (1948); *People v Paille #2,* 383 Mich 621, 627 (1970); *People v Talley,* 410 Mich 378, 386 (1981); *People v King,* 412 Mich 145, 154 (1981); *People v Neal,* 201 Mich App 650, 654 (1993); *People v Orzame,* 224 Mich App 551, 557 (1997).

To abolish the above precedents, without adequate reason, would be unwise. To, in effect, abolish the preliminary examination statute would constitute an infringement of the principle of separation of powers. To hold that counsel for defendant can cross-examination preliminary examination witnesses, but if their credibility crumbles, the magistrate must turn a deaf ear, defies common sense. As professors La Fave, Israel and King have written:

> Courts almost uniformly recognize that the magistrate has the authority to judge credibility. If that were not so, there would be no reason for allowing the defense to cross-examine prosecution witnesses and present contradicting evidence of its own.

La Fave, Israel and King, *Criminal Procedure,* 2d Ed, §14.3(b), p 153 (1999).

IV. THE VARIOUS PROSECUTORS HAVE DEMONSTRATED NO NEED FOR A DRASTIC CHANGE THE CURRENT EXAMINATION PROCEDURE IN MICHIGAN.

PAAM's advocacy of this new, unusual review process regarding exam bind-overs is not only confusing and ill-advised, it is simply unnecessary.

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According to the Bay County Prosecutor, motions to dismiss at preliminary examinations in Michigan are successful in less than one tenth of one percent of cases. If prosecutors are doing that well, and *amicus* has no doubt of the accuracy of that figure, what possible need is there to substitute a novel, convoluted, and maybe illegal standard for the present one? PAAM's argument seems to be that Michigan should adopt what amounts to a "zero tolerance" standard for dismissals at preliminary exams.

This is what PAAM's bifurcated standard of review means. "This leaves the current standard of review - abuse of discretion - applicable in 99.9% of the cases [where the prosecution wins], with *de novo* review applicable in that rare instance where the magistrate finds testimony unbelievable by a rational person." (*Amicus* Supplemental Brief, p 3). If adopted, this standard would allow the prosecutor to have its cake and eat it too.[1]

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[1] PAAM apparently believes in binding over all defendants at the preliminary exam. That's the real meaning of their argument that "It is logical that the system 'funnel' cases in this matter. But it is illogical for the criminal justice system to function as an hourglass, where the magistrate at the examination has *greater* authority, with regarding (sic) to aborting the prosecution on the ground of credibility of witnesses, than does the trial judge on a motion for directed verdict." (*Amicus* Supplemental Brief, p. 4).

Common sense tells us that funnels screen out none of the liquid that pass through them and so a process that "funnels" defendants through a system will not screen out cases at preliminary examinations. Dennis Richardson has argued that magistrates must not be funnels, but rather sieves, separating the wheat from the chaf of criminal prosecutions. "[T]he ... preliminary hearing is a 'critical stage' of the state's criminal process ..." *Coleman v Alabama,* 399 US 1, 10; 99 S Ct 1999; 26 L Ed 2d 387 (1970). Citing *Powell v Alabama,* 287 US 45, 57; 53 S Ct 55; 77 L Ed 158 (1932). A preliminary examination is not a critical stage when its only function is to funnel defendants automatically to the circuit courts.

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This Court should not place its imprimatur on a prosecutor's concept, created out of nothing, which changes the preliminary examination process, long-held to function as a hearing necessary to weed out frivolous, unfounded prosecutions,[2] into a meaningless, rubber-stamp appearance which simply mirrors the warrant process.

V. PAAM'S PROPOSED NEW STANDARD HAS A SIGNIFICANT EFFECT ON *AMICUS*, DENNIS RICHARDSON'S, CASE.

In its Supplemental Brief, PAAM asks this Court to impose a new standard for appellate review of magistrates' bind-over decisions. Dennis Richardson has pointed out that that proposition is without precedent, constitutes judicial activism, and is an unnecessary experiment. Beyond that Mr. Richardson emphasizes that in the bind-over decision in his case the magistrate found not only that the quality/credibility factor was insufficient, but also that the quantity of evidence to establish gross negligence, and hence manslaughter, was insufficient.

The new proposal would require any appellate court to review the magistrate's decision on the two above issues with completely different standards. That may not be impossible, it is needlessly complicated and can create a more

[2] Interestingly, when this Court first reviewed Dennis Richardson's application for leave to appeal, the Court, in lieu of granting the application, remanded his cause to the Michigan Court of Appeals, directing that court to specifically answer the question of whether the prosecution had produced any evidence that Richardson had been guilty of gross negligence. Mr. Richardson has returned to this Court, on a second application, claiming that the Court of Appeals has yet to answer that question.

difficult conundrum. If the only evidence presented is both incredible and insufficient, should the same evidence, on review, be subject to two standards? Or, if the only testimony at the exam is found unbelievable, although sufficient in quantity, what standard will be used?

The PAAM proposition will not only clog circuit courts with unfounded prosecutions, but it will also dramatically increase appeals and cause confusion in the resolution of those appeals.

RELIEF REQUESTED

Amicus Dennis Richardson asks this Court to reject the arguments of *amicus* PAAM, presented in their Supplemental Brief, and to remand both the *Yost* and *Richardson* cases to their respective circuit courts with orders to dismiss those cases as was previously ordered by proper decisions of the magistrates.

Respectfully submitted,

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Dated: December 16, 2002

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PROOF OF SERVICE

STATE OF MICHIGAN)
: SS
COUNTY OF WAYNE)

Francisca Mateo, being first duly sworn, deposes and states that on December 16, 2002, she served copies of *AMICUS CURIAE* DENNIS RICHARDSON'S RESPONSE TO SUPPLEMENTAL CLARIFYING BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN, upon:

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Francisca Mateo

Subscribed and sworn to before
me this 16th day of December, 2002.

Julie L. Chomos, Notary Public
Wayne County, Michigan
My Commission Exp.: 5/16/04